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On September 25, 1981, Judge Sandra Day O'Connor of the Court of Appeals of Arizona took the oath of office as an Associate Justice of the Supreme Court of the United States. Justice O'Connor's elevation to the Court should be of great interest to state and local governments because her extensive prior involvement in local government should give her an unusual perspective in cases before the Court implicating state or local interests.

I. INTRODUCTION

Justice O'Connor has served previously as an assistant state attorney general, a state legislator, and a state trial and intermediate appellate court judge. Thus, her professional experiences have been intensely "local" and presumably have versed her thoroughly in many of the problems confronting state and local governments. By contrast, most of the sitting Justices were working within a "federal" context at the time of appointment to the Court. When nominated, Chief Justice Burger and Justices Marshall, Blackmun, and Stevens were all sitting on United States Courts of Appeals; Justices White and Rehnquist were serving as senior officials in the Department of Justice. And neither of the other members of the Court, Justices Brennan and Powell, had as wide a variety of experiences in state and local government as Justice O'Connor.

Popular publicity concerning Justice O'Connor has emphasized that she is the first woman to sit on the Court, rather than that her experience has been in local government. Yet, it seems likely that there will be many more occasions on which her local government experiences might give her an unusual perspective. Indeed, of the first twenty-two cases decided by full opinions in the Court's 1982 Term, at least eight directly involved interests of state or local governments: *Fair Assessment in Real Estate Association v. McNary*[1] (barring damage actions under 42 U.S.C. § 1983 for alleged un-

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1. 102 S. Ct. 177 (1981).

constitutional administration of a state tax system); *Watt v. Energy Action Educational Foundation*[2] (rejecting a state's challenge to Department of the Interior practices for leasing offshore oil and gas resources); *Widmar v. Vincent*[3] (overturning a state university's exclusion of a student religious group from campus facilities); *Citizens Against Rent Control v. City of Berkeley*[4] (invalidating a municipal ordinance limiting financial contributions to political committees); *Polk County v. Dodson*[5] (holding that a public defender does not act "under color of state law" for purposes of 42 U.S.C. § 1983); *Cabell v. Chavez-Salido*[6] (upholding a requirement that state probation officers be citizens); *Texaco, Inc. v. Short*[7] (upholding a state statute terminating certain unused mineral rights); and *Community Communications Co. v. City of Boulder*[8] (subjecting local governments to possible antitrust liability for certain regulatory actions).[9]

Of course, a familiarity with "local" problems does not guarantee sympathy for state or local interests, nor does it necessarily create a belief that local officials are able and willing to respond appropriately to local conditions that touch upon federal rights and interests. For example, despite his background as a state judge, Justice Brennan has been a vigorous exponent of expansive federal habeas corpus review of state criminal convictions.[10] And any number of federal district court judges familiar with local concerns have found it necessary to intervene in the running of state prison systems, local school districts, and the like.[11]

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2. 102 S. Ct. 205 (1981).
3. 102 S. Ct. 269 (1981).
4. 102 S. Ct. 434 (1981).
5. 102 S. Ct. 445 (1981).
6. 102 S. Ct. 735 (1982).
7. 102 S. Ct. 781 (1982).
8. 102 S. Ct. 835 (1982).
9. By contrast, the only case among those 22 with overt implications for women's interests was Ridgway v. Ridgway, 102 S. Ct. 49 (1981), upholding a serviceman's right under a federal statute to designate a life insurance beneficiary other than as provided for in a state court divorce decree. Justice O'Connor did not participate in *Ridgway*. However, in Bugh v. Bugh, 125 Ariz. App. 190, 608 P.2d 329 (Ct. App. Div. 1, 1980), she authored an opinion holding that worker's compensation benefits received after divorce were the separate property of the husband.
10. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 99 (1977) (Brennan, J., dissenting); Stone v. Powell, 428 U.S. 465, 502 (1976) (Brennan, J., dissenting); Francis v. Henderson, 425 U.S. 536, 542 (1976) (Brennan, J., dissenting).
11. *See, e.g.*, Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979), *modified*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Booker v. Special School Dist. No. 1, 451 F. Supp. 659 (D. Minn.), *aff'd*, 585 F.2d 347 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979) (administration of school desegregation plans); Smiley v. Vollert, 433 F. Supp. 463 (S.D. Tex. 1978), *modified sub nom.* Smiley v. Blevins, 514 F. Supp. 1248 (S.D. Tex. 1981); Laaman v. Hedgemoe, 437 F. Supp. 269 (D.N.H. 1977) (administration of prisons).

However, a 1981 lecture by then Judge O'Connor contains strong indications that she is often likely to be in sympathy with those members of the Court (Chief Justice Burger, Justice Rehnquist, and less predictably, Justice Powell) who most frequently tend to presume the responsiveness of local officials and uphold the interests of state and local governments asserted before the Court. In her lecture, entitled *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*,[12] Justice O'Connor applauded "the recent trend in the United States Supreme Court shifting to the state courts some additional responsibility for determination of federal constitutional questions in state criminal cases."[13] She also noted: "Among the proposals [to restrict federal court jurisdiction] which have merit from the perspective of a state court judge are the elimination or restriction of federal court diversity jurisdiction, and a requirement of exhaustion of state remedies as a prerequisite to bringing a federal action under section 1983."[14] Justice O'Connor favored more deference to state courts because "[t]here is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions."[15]

If the attitude reflected in Justice O'Connor's lecture carries over into her votes, the Burger-Rehnquist-Powell orientation may command the allegiance of a fourth Justice. And her early voting on the Supreme Court has tended to support the state or local government interest in closely divided cases. In the eight Supreme Court cases involving state or local interests noted above, Justice O'Connor voted against the state or local government interest three times—in the offshore leasing case,[16] in the university facilities case,[17] and in the municipal election case,[18] but in each instance with a substantial majority of the Court. She voted squarely in favor of the local government interest four times—with the majority, in the eight-to-one public defender case,[19] in the five-to-four citizenship require-

12. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

13. *Id.* at 802.

14. *Id.* at 815.

15. *Id.* at 813 (quoting Justice Rehnquist's majority opinion in Sumner v. Mata, 101 S. Ct. 764, 770 (1981)):

> State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.

16. Watt v. Energy Action Educ. Found., 102 S. Ct. 205 (1981).

17. Widmar v. Vincent, 102 S. Ct. 269 (1981).

18. Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434 (1981).

19. Polk County v. Dodson, 102 S. Ct. 445 (1981).

ment case,[20] and in the five-to-four mineral interest case;[21] and in dissent, with the Chief Justice and Justice Rehnquist, in the five-to-three antitrust liability case.[22]

However, Justice O'Connor's votes in her eighth Supreme Court case, *Fair Assessment in Real Estate Association v. McNary*,[23] and in a number of her state court cases, suggest that advocates would be ill-advised to assume her vote and direct their briefs only at the somewhat unpredictable "swing" votes of Justices White, Blackmun, and Stevens. Justice O'Connor's decisions suggest an open-mindedness that may stamp her as another swing vote. Moreover, like other judges, she is likely to be affected by her personal views and experiences in approaching particular issues, and the results may sometimes be unexpected, as illustrated by her vote in *McNary*.

In *McNary*, the question was whether a state taxpayer may bring a damage action in federal court under section 1983 for allegedly unconstitutional administration of the state tax system. A five Justice majority held that, in light of the "important and sensitive nature of state tax systems,"[24] principles of comity bar such taxpayer damage actions, just as the Tax Injunction Act bars injunctive actions against the enforcement of state taxes. Justice Rehnquist wrote the opinion of the Court and was joined by the Chief Justice and Justices White, Blackmun, and Powell. Justice O'Connor, along with Justices Marshall and Stevens, joined the concurring opinion by Justice Brennan. Justice Brennan rejected the majority's flat bar to such actions but concluded that the suit in question had been properly dismissed. He reasoned that, in the tax context, the plaintiffs should have exhausted their state administrative remedies before seeking to invoke federal jurisdiction (although such exhaustion has not been required under section 1983 in other contexts).[25] Thus, Justice O'Connor declined to join a majority opinion which offered broad protection for the state interests in administration of tax systems and instead joined a narrower opinion which simply imposed an exhaustion requirement. This may reflect her prior view, as expressed in her lecture, that an exhaustion requirement should be imposed more generally under section 1983.

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20. Cabell v. Chavez-Salido, 102 S. Ct. 735 (1982).

21. Texaco, Inc. v. Short, 102 S. Ct. 781 (1982).

22. Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

23. 102 S. Ct. 177 (1981).

24. *Id.* at 179.

25. *See, e.g.*, Ellis v. Dyson, 421 U.S. 426, 432 (1975) (challenge to the constitutionality of littering statute); Gibson v. Berryhill, 411 U.S. 564, 574 (1973) (challenge to Alabama statutory scheme regulating optometry practice).

Justice O'Connor's vote in *McNary* emphasizes the opportunity for Supreme Court advocates to win what might seem unlikely votes by appealing effectively to the personal views and experiences of individual Justices.[26] Once a Justice has a substantial voting record at the Supreme Court, those who follow the Court closely, such as the Solicitor General of the United States, develop a feel for the type of arguments that appeal to that Justice. Until Justice O'Connor evolves such a record over a number of terms, however, advocates before the Court should consider consulting her rulings while on the state court.[27]

The predictive value of her lower court rulings is, of course, somewhat limited by the nature of the courts on which she sat. The chart below summarizes the types of cases in which Justice O'Connor participated as an appellate judge.[28] Although the classifications are necessarily arbitrary, it is clear that her prior judicial experience did not expose her regularly to federal statutory and constitutional issues.

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26. If true, an anecdote related about Mapp v. Ohio, 367 U.S. 643 (1961), by a clerk resident at the Court during the 1960 Term also illustrates vividly the opportunity to garner votes in unlikely places. As a general proposition, Justice Clark was less likely than many of his colleagues on the Warren Court to uphold federal constitutional claims in criminal cases. But, as a young lawyer, he apparently had lost a criminal case when federal law enforcement officers turned over evidence suppressable in a federal case to state officers, who obtained a state conviction. The imbalance in the exclusionary rule had rankled Justice Clark for years when *Mapp* reached the Supreme Court. Although the case was briefed and argued primarily on first amendment grounds because the materials eventually suppressed were pornographic, Justice Clark seized upon the fourth amendment issues in the case and persuaded his colleagues to extend the exclusionary rule to the states.

27. Studying lower court opinions is helpful not only as an initial educational tool but also in the actual litigation of particular cases. Citation of lower court opinions written by even an experienced Justice is often helpful to remind the Justice of previously held views.

28. The 82 cases reflected in the chart include: (1) 39 opinions written on the court of appeals; (2) 40 other cases in which she participated on the court of appeals; (3) one opinion written while sitting by designation on the Supreme Court of Arizona; and (4) two other opinions in which she participated while sitting on the supreme court. Justice O'Connor never filed or joined a concurrence or dissent on the state bench.

The LEXIS search on which the chart is based was completed on January 17, 1982. Since Justice O'Connor's trial court opinions are not available in LEXIS, the only trial court cases discussed in this article are those in which she was identified as the trial judge in appeals to the court of appeals or the Supreme Court of Arizona.

It may be of interest to note that 13 of Justice O'Connor's trial-court decisions have been considered in the court of appeals, where two were reversed and eleven were affirmed. Ten of her decisions reached the Supreme Court of Arizona, which affirmed five, reversed four, and reversed in part and affirmed in part one decision.

STATE APPELLATE CASES IN WHICH JUSTICE O'CONNOR PARTICIPATED

1.	*Civil Cases*	
	General Civil Cases	
	Federal constitutional issues	3
	Government employee issues	2
	Commercial disputes	5
	Consumer disputes	2
	Torts	7
	Family law issues	4
	Civil Procedure	2
	Evidence	4
	Miscellaneous	4
	Unemployment Insurance	
	Statutory interpretation	4
	Substantial evidence	5
	Procedural issues	1
	Workmen's Compensation	
	Statutory interpretation	11
	Substantial evidence	7
	Procedural issues	4
2.	*Criminal Cases*	17
	TOTAL	82

Notwithstanding the nonfederal nature of most of the cases she decided below, however, Justice O'Connor did participate in a number of cases that may be of interest to state and local government lawyers appearing before the Supreme Court. The most relevant cases are discussed briefly below to provide a starting point for the advocate preparing such a case. The discussion will not assess the merits of the decisions reached, although that process would be an important part of preparing a particular case. In addition, a lower court judge has less opportunity to develop his or her own views than does a Justice.

II. SPECIFIC AREAS

Taxing Power. As a lower court judge, Justice O'Connor participated in four cases challenging taxes imposed by state or local governments. She voted twice to invalidate and twice to sustain the local tax.

One of her tax cases, which eventually reached the United States Supreme Court in *Central Machinery Co. v. Arizona Tax Commission*,[29] clearly demonstrates that Justice O'Connor is not an entirely predictable

29. 448 U.S. 160 (1980).

vote when state or local interests come into conflict with the interests of the federal government. There, in an unreported trial-court opinion later vindicated by the United States Supreme Court, she ruled that a state tax was preempted by federal Indian policy.

The taxpayer, Central, solicited sales on the Gila River Indian Reservation and eventually obtained a contract to sell tractors to a reservation enterprise. Central's premises were not located on the reservation, nor was Central licensed to trade with Indians. The local Bureau of Indian Affairs Superintendent, however, had approved the transaction. Under *Warren Trading Post v. Arizona Tax Commission*,[30] the sale would have been exempt from state sales tax if it had been made by a licensed trader located on the reservation. As an unlicensed trader, Central calculated and paid the tax under protest but then filed for recovery, stipulating that any recovery would be paid to the Indian enterprise.

Justice O'Connor entered summary judgment for Central on the authority of *Warren*, apparently reasoning that *Warren* precluded imposition of an economic burden on the Indians whether or not the Bureau of Indian Affairs Superintendent had required Central to obtain a license. As quoted by the dissent in the Supreme Court of Arizona, her opinion stated:

> Nowhere do the federal statutes and regulations indicate that noncompliance by a trader or the Bureau of Indian Affairs [with the licensing regulations] will allow imposition of state laws which would otherwise be inapplicable. It is the existence of the federal laws and accompanying regulations and not their enforcement which preempts the State's ability to tax the transaction in question.[31]

The Supreme Court of Arizona reversed, over a vigorous dissent in defense of Justice O'Connor's opinion, finding that the case was "clearly distinguishable" from *Warren* because Central was an unlicensed trader. The majority was of the view that, even if the economic burden fell on the Indians, imposition of the tax did "not run afoul of any congressional enactments passed to protect and guard [the federal government's] Indian wards."[32]

Central then appealed to the United States Supreme Court, which held, in a five-to-four opinion, that the transaction could not be taxed. Echoing Justice O'Connor's language below, the Court concluded that it was irrelevant that Central was not a licensed Indian trader: "It is the existence of the Indian trader statutes, then, and not their administration, that

30. 380 U.S. 685 (1965).

31. State v. Central Machinery Co., 121 Ariz. 183, 186, 589 P.2d 426, 429 (1976).

32. *Id.* at 184, 589 P.2d at 427.

preempts the field of transactions with Indians occurring on reservations."[33] Justice O'Connor's predecessor, Justice Stewart, filed a dissenting opinion joined by Justices Powell, Rehnquist, and Stevens. The dissent argued that the case should be distinguished from *Warren* because taxation of Central's isolated transaction with the tribe enterprise would not threaten the statutory policies protecting Indians against unfair prices, as would the routine taxation of the ongoing business of a licensed trader on the reservation.[34]

A second tax case, *Salt River Project Agricultural Improvement and Power District v. City of Phoenix*,[35] involved a conflict between the interests of two different bodies of local government. There, Justice O'Connor joined an opinion invalidating the tax, and the result may illuminate her views on intergovernmental immunity. In *Salt River*, the City of Phoenix attempted to impose its privilege license (excise) tax on the sale of electricity by the Salt River District to the Roosevelt Irrigation District. Salt River was organized under the Reclamation Act of 1902[36] to irrigate arid lands and drain wet lands. Both Salt River and Roosevelt were political subdivisions of the state and municipal corporations. Salt River contracted to sell nonsurplus electricity to Roosevelt at cost, along with certain equipment, in exchange for Roosevelt's irrigating and draining Salt River project lands. Phoenix attempted to impose its excise tax on the proceeds of the sale of electricity.

Salt River contended that it was immune from taxation under the Arizona Constitution; Phoenix relied on previous cases holding that Salt River's *retail* sales of *surplus* electricity were subject to tax. The panel held that Salt River's sales to Roosevelt were immune from taxation, because the nonsurplus electricity was sold to support the basic governmental purposes of the district:

> We hold that the [Salt River] Project serves a governmental function while engaged in the primary public purpose for which it was authorized and formed: the reclamation and irrigation of

33. 448 U.S. at 165 (footnote omitted).

34. In another interesting case, Justice O'Connor also applied a federal statute where others might have sought not to. While sitting as trial judge in a murder case, Justice O'Connor suppressed vital evidence obtained when bored telephone operators eavesdropped on an emergency call. Even though the operators were acting strictly in a private capacity, Justice O'Connor held that exclusion was required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Suppression of the evidence was affirmed in State v. Dwyer, 120 Ariz. 291, 585 P.2d 900 (Ct. App. Div. 1, 1978), over a special concurrence in which Judge Wren stated that he had "searched in vain for a legal premise upon which to dissent from this bizarre result." *Id.* at 295, 585 P.2d at 904.

35. 631 P.2d 553 (Ct. App. Div. 1, 1981).

36. 43 U.S.C. § 371 (1976).

> arid lands, the drainage of waterlogged lands, and the production of electricity for these purposes. . . .
>
> . . . .
>
> The incidence of the City's excise tax is on the Salt River Project's sale of nonsurplus electricity, at cost, to Roosevelt District, under the Water Contract. The electricity sold to Roosevelt District is used to accomplish the primary governmental purpose of each: drainage and irrigation. This is not, then, a tax on "surplus" electric sales incidental to the primary purpose of the Salt River Project, but rather it is a [prohibited] tax on the primary purposes of both the Project and Roosevelt District.[37]

Where the competing interests in a state or local tax case were those of private business, rather than other levels of government, Justice O'Connor twice voted to sustain the taxing authority, suggesting that she does not have a "taxpayer's" orientation in every case. *J.C. Penney Co. v. Arizona Department of Revenue*[38] arose from Arizona's "rental occupancy tax."[39] Prior to enactment of the rental occupancy tax, Arizona imposed a two percent tax on rents received by *landlords* for leases entered into after 1967. The exemption for "preexisting" leases was enacted in the belief that, under such leases, landlords would be unable to pass the tax on to their tenants, while the tax could be passed on in the case of new leases. In 1974, however, Arizona imposed a two percent rental occupancy tax directly on the *tenants* occupying premises under preexisting leases.

The tax on landlords had never been imposed on tax-immune state or federal entities. When the legislature enacted the rental occupancy tax on tenants, it chose to exempt tenants when "the constitution or laws of the United States or this state would prohibit this state from taxing were the landlord to be the tenant."[40] In other words, Arizona created a tax classification favoring the tenants of tax-exempt landlords. Many states apparently have taken the opposite approach, imposing a general rental tax on nonexempt landlords and supplementing it with a rental occupancy tax on the tenants of tax-exempt landlords, the goal being to equalize the economic burden between the classes of tenants.[41]

A tenant of a nonexempt landlord under a preexisting lease challenged the rental occupancy tax on the ground that it denied equal protection by favoring the tenants of tax-exempt landlords. Justice O'Connor held, for a

37. 631 P.2d at 556-57.

38. 125 Ariz. 469, 610 P.2d 471 (Ct. App. Div. 1, 1980).

39. The case illuminates Justice O'Connor's views on equal protection analysis, as well as on taxing power. *See infra* notes 68-75 and accompanying text.

40. ARIZ. REV. STAT. ANN. § 42-1712(2) (1980).

41. *See* 125 Ariz. at 473-74, 610 P.2d at 474-76.

unanimous panel, that the classification was permissible. She began by emphasizing that a tax is to be presumed constitutional and that the challenger "has the burden of overcoming the presumption that the classifications rest upon some reasonable basis and are not purely arbitrary."[42] She then determined that the legislation served a legitimate legislative desire "to maintain equality between the two *taxes*."[43] That legislative goal required that "the lease should be exempt from the rental occupancy tax when the lessor is a tax-immune entity inasmuch as the same lease would be exempt from the transaction privilege tax on rental income if the lessor were a tax-immune entity."[44] To measure the rationality of the classification exempting from tax the tenants of tax-exempt landlords, she relied principally on the line of cases holding that local governments have broad flexibility to impose a privilege tax on an entity doing business with a tax-exempt entity. Recognizing that the typical scheme seeks to equalize the burden on tenants, she nonetheless found that Arizona's scheme was constitutionally justified because it was rationally designed to preserve the *inequality* between classes.

As a trial judge, Justice O'Connor also upheld application to a private business of the Phoenix privilege tax invalidated in *Salt River*, and was affirmed by the Supreme Court of Arizona in *Univar Corp. v. City of Phoenix*.[45] Phoenix sought to tax certain gross sales revenues earned by a business that maintained a warehouse in Phoenix, even though the actual sales of stock were made at locations outside the city. Univar contended that the city had violated the city charter and state constitution by imposing a tax beyond its borders. The Supreme Court of Arizona affirmed Justice O'Connor's determination that the charter and constitution both permitted the tax in question.

Rights of Government Employees. Justice O'Connor participated in two cases concerning disciplinary actions against government employees and presenting facts similar to those often found in Supreme Court cases. Both cases suggest that she may be prepared to insist on the strict observance of due process formalities, but the second case also suggests that it may be difficult to persuade her to second-guess the substantive validity of termination or nonretention decisions reached by state or local government employers.

In *Orth v. Phoenix Union High School System*,[46] Justice O'Connor con-

42. *Id.* at 472, 610 P.2d at 474 (citations omitted).
43. *Id.* at 474, 610 P.2d at 476 (emphasis added).
44. *Id.*
45. 122 Ariz. 220, 594 P.2d 86 (1979).
46. 126 Ariz. 151, 613 P.2d 311 (Ct. App. Div. 1, 1980).

curred in a unanimous decision that the school board had failed to follow statutory procedures in dismissing a teacher for classroom inadequacy. The statute provided that the school board or its representative was required to give a teacher ninety days notice of intention to dismiss for classroom inadequacy, "specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the teacher an opportunity to correct his faults and overcome the grounds for such charge."[47] The teacher was informed of negative performance ratings over an extended period but eventually received only thirty days specific notice of intent to dismiss. The panel held that "notice provisions . . . must be strictly followed"[48] and that adverse performance evaluations not explicitly linked to possible termination did not suffice as the requisite warning. The panel even added dictum that the general authority of the principal over teacher performance did not necessarily empower him to give the statutory notice.

Justice O'Connor showed a similar insistence that prescribed procedures be followed in *Cooper v. Arizona Western College District Governing Board*.[49] Arizona's equivalent of the Sunshine-in-Government Act provided that "governing bodies" could take "legal action" only in public session, although executive sessions could be held for preliminary discussion of, among other things, personnel decisions.[50] In *Cooper*, the Board convened a properly noticed public meeting and went into executive session twice during the day. At the end of the day, the Board formally announced that the next meeting would be a week later, but selected public attendees were informed that the Board would convene the following day. In that session, the Board determined not to renew the contracts of eight staff members. The staff members were notified immediately, and the action was publicly announced at the scheduled session the following week.

The staff members sought both a judicial declaration that the nonrenewal decisions were void and an injunction against future violations of the open-meeting law. Justice O'Connor's opinion for a unanimous panel held that the nonrenewals were "legal actions" required to be taken in a public meeting. She therefore held that any action taken in executive session during the first meeting or at the unpublicized session was invalid. But she went on to hold that an invalid decision could be rehabilitated by approval at a properly announced public meeting. The case was remanded for consideration of whether the Board's public announcement constituted

47. ARIZ. REV. STAT. ANN. § 15-265 (1974).
48. 126 Ariz. at 153, 613 P.2d at 313.
49. 125 Ariz. 463, 610 P.2d 465 (Ct. App. Div. 1, 1980).
50. ARIZ. REV. STAT. ANN. § 38-431.03 (1974).

an approval or a mere notice. The opinion expressed no suspicion of the Board's good faith, despite the somewhat conspiratorial method in which the second day's session was convened. Nor was there any consideration in the opinion of the possible need for safeguards to assure that the "legal action" was not impermissibly tainted by the prior invalid procedures.

Municipal Tort Liability. Recent years have seen a considerable expansion of plaintiffs' ability to bring damage actions under 42 U.S.C. § 1983 for violation of federal rights.[51] As noted above, Justice O'Connor recommended in her 1981 lecture that exhaustion of state court remedies be required prior to the filing of section 1983 suits in federal court, suggesting that "[w]e should allow the state courts to rule first on the constitutionality of state statutes."[52] This, however, may also reflect some dissatisfaction with the very concept of damage suits under section 1983. She noted that "[e]ven state court judges are not immune from a section 1983 suit"[53] and that "state courts, . . . state legislatures and executive officers" would welcome congressional limits on the use of section 1983.[54]

An advocate with a section 1983 case before the Court would be well-advised to study her lecture on that subject for insights on her likely vote. Moreover, since section 1983 actions are essentially tort actions, advocates with such cases should consider consulting her lower court tort cases, especially the two cases involving municipal tort liability.[55]

Justice O'Connor sat as the trial judge in the case affirmed in *Chavez v. Tolleson Elementary School District*.[56] *Chavez* involved a wrongful death action against a school district brought by the parents of a ten-year old who left her school grounds and was abducted and slain. The parents, alleging the school's negligence in supervising their child, obtained a jury verdict but Justice O'Connor granted judgment n.o.v. on the ground that plaintiffs had "failed to establish by the evidence the standard of care re-

51. *See, e.g.*, Hendriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981) (denial of access to courts); Harper v. Merckle, 638 F.2d 848 (5th Cir. 1981) (damages for false imprisonment); Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), *cert. denied* 450 U.S. 931 (1981) (alleged defamation by city and state officials); McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980) (damages for heart attack suffered during a wrongful government taking of private property); Chavez v. City of Santa Fe Hous. Auth., 606 F.2d 282 (10th Cir. 1979) (action by tenants against assessments); Meredith v. Arizona, 533 F.2d 481 (9th Cir. 1975) (assault of inmate by prison guard).

52. O'Connor, *supra* note 12, at 815.

53. *Id.* at 809.

54. *Id.* at 810.

55. A third case involving the financial liability of a local government, St. Joseph's Hosp. & Medical Center v. Maricopa County, 635 P.2d 527 (Ct. App. Div. 1, 1981), is discussed *infra* at text accompanying notes 64-67.

56. 122 Ariz. 472, 595 P.2d 1017 (Ct. App. Div. 1, 1979).

quired by the school district . . . ."[57] While the exact meaning of her disposition is unclear, it could be interpreted to suggest some disinclination to subject government officials to ordinary principles of tort liability.

The appellate court affirmed, but rejected her rationale. It ruled that the school district had a duty to exercise ordinary reasonable care in supervision of pupils and that no specific proof was required to establish the bounds of this duty. The court concluded, however, that the possibility that a child might be abducted and slain was not a foreseeable risk against which the school was required to take precautions.

Justice O'Connor showed more sympathy for the plaintiff's claim in her opinion for a unanimous panel in *Lowman v. City of Mesa*.[58] There, the plaintiff suffered personal injuries when her vehicle struck another vehicle that had been abandoned on the city streets for eighteen hours. Justice O'Connor attempted to reconcile two divergent threads of Arizona law concerning municipal liability. On the one hand, municipalities have a common law duty to individual motorists to maintain roads in a safe condition and thus are liable for hazards such as potholes. On the other hand, municipalities have only a generalized duty to enforce laws, and ordinarily are not liable to individuals for accidents caused, for example, by drunken drivers the police have not arrested. Justice O'Connor held that the abandoned car constituted a hazard within the first line of cases and remanded for consideration of whether the city had violated its duty to remove the hazard within a reasonable time or to warn of its existence. Despite the ruling for the plaintiff, *Lowman* also suggests that Justice O'Connor ordinarily may be somewhat reluctant to impose tort liability on local governments, since she emphasized that plaintiff's claim was rooted in the city's duties as a particular kind of property owner and sharply distinguished other governmental functions:

> Other Arizona cases have found only a general duty to the public and have refused to impose liability on the governmental entity for individual injuries. *See Bagley v. State*, 122 Ariz. 365, 595 P.2d 157 (1979) (failure of mine inspector to shut down a mine violating safety standards); *McGeorge v. City of Phoenix*, 117 Ariz. 272, 572 P.2d 100 (App. 1977) (failure of police to detain a person known to police to have violent tendencies or failure to warn decedent of those tendencies); *Ivicevic v. City of Glendale*, 26 Ariz. App. 460, 549 P.2d 240 (1976) (failure of police to prevent intoxicated person from driving); *Duran v. City of Tucson*, 20 Ariz. App. 22, 509 P.2d 1059 (1973) (failure of fire department

57. 122 Ariz. at 474, 595 P.2d at 1019.

58. 125 Ariz. 590, 611 P.2d 943 (Ct. App. Div. 1, 1980).

> officials to enforce fire code). *Cf. Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977) (duty of Parole Board narrowed to an individual one by assumption of control by Board over dangerous parolee).
>
> In this case, the Mesa City Code § 10-3-29(A)(3) authorizes the city police to remove unattended vehicles . . . . Any duty of the police by virtue of the code to remove such a vehicle is one owed to the public generally and the failure of the police to [do so] . . . would not ordinarily give rise to liability to a member of the public . . . . However, the city has a common law duty owed to all users of city streets to keep them reasonably safe . . . . It is an alleged breach of *this* duty which appellant is entitled to have considered by the trier of fact.[59]

Eminent Domain. In *Texaco, Inc. v. Short*,[60] Justice O'Connor joined Justice Stevens' opinion for the Court upholding a state statute which regulated severed mineral interests. The statute provided that, unless the mineral owner files a claim statement in the local county recorder's office, certain severed mineral interests would automatically lapse after twenty years of nonuse and revert to the current surface owner of the property. The Court rejected, among other contentions, the claim that the statute took property without just compensation, reasoning that it was "the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right." Thus, the Court concluded that no compensable "taking" occurred upon extinguishment of the severed mineral rights.[61]

The factual context of *Texaco, Inc.* bears an interesting resemblance to Justice O'Connor's only state court case dealing directly with local government powers over land use. In *Sende Vista Water Co. v. City of Phoenix*,[62] the city entered into a contract with a developer, Presley, for construction of a water delivery system for Presley's newly-constructed subdivision. After construction, the city was to purchase and operate the system. However, fifteen years previously another company, Sende Vista, had been issued a certificate of convenience and necessity for construction of a public water system to serve a 360-acre area included within the subdivision. Sende Vista had never constructed any portion of the public water system authorized by its certificate.

Sende Vista sued for a permanent injunction against the city's contract

59. 125 Ariz. at 593, 611 P.2d at 946 (emphasis in original; footnote omitted).

60. 102 S. Ct. 781 (1982).

61. *Id.* at 792.

62. 127 Ariz. 42, 617 P.2d 1158 (Ct. App. Div. 1, 1980).

with Presley. The injunction was granted by the trial court, but Justice O'Connor substantially modified it in an opinion for a unanimous panel. She held that, under Arizona law, the city could not operate a water system within the area of Sende Vista's certificate without first condemning the certificate, even though "the holder of the certificate of convenience and necessity has not yet constructed facilities and the only property taken is the certificate itself."[63] Thus, pending condemnation of the certificate, an injunction against construction or operation by Presley of a water system in the 360-acre area was proper. Presley, however, was free to proceed with construction of facilities on the remainder of the subdivision, and the city was free to initiate condemnation proceedings against Sende Vista's certificate of convenience and necessity.

The peculiarities of *Texaco, Inc.*, and *Sende Vista* make it very difficult to predict Justice O'Connor's future votes in cases involving land use regulation. Her willingness to protect the inactive certificate of convenience and necessity in *Sende Vista* suggests that she may favor compensation in contexts resembling conventional takings. But her vote in *Texaco, Inc.* seems to recognize the existence of broad authority in local governments to regulate land use without compensation where the government is not directly taking property for government use.

Justice O'Connor also confronted a taking question outside the real property context in what appears to have been her last opinion for the Arizona Court of Appeals. In *St. Joseph's Hospital and Medical Center v. Maricopa County*,[64] a hospital brought suit against Maricopa County to be reimbursed for emergency medical care provided to an indigent patient. Under Arizona law, private hospitals apparently are required to accept indigents for emergency medical care, but the counties must reimburse the hospitals for such care. An "indigent" is defined as an individual with annual net income of $2,100 or less, after medical expenses. A patient with an income of approximately $4,600 was admitted to St. Joseph's for emergency care and eventually removed to the county hospital. St. Joseph's billed the county at its normal rates for paying patients and successfully sued for that amount in the trial court.

On appeal, Justice O'Connor's opinion for the panel rejected the county's contention that it had no obligation to reimburse St. Joseph's because the patient had not been indigent when admitted. However, her opinion modified the lower court's award of the hospital's standard charges. She ruled that approximately $2,500 of the bill, representing the

63. *Id.* at 45, 617 P.2d at 1161.

64. 635 P.2d 527 (Ct. App. Div. 1, 1981).

difference between the patient's gross income and the indigency level, should be disallowed. She held that, as to the balance of the bill, St. Joseph's was not entitled to reimbursement at its standard rate, but only for the actual cost of the care.

St. Joseph's argued that the combination of its obligation to accept the indigent patient and the limitations on its reimbursement unconstitutionally deprived it of property without just compensation. An amicus curiae argued that compensation at cost "would result in an inequitable 'tax levied upon the [non-indigent] sick,' and that these costs should more properly be distributed among the county taxpayers at large."[65] Justice O'Connor held that the $2,500 disallowance did not constitute a taking because it was the patient's "personal responsibility" and "St. Joseph's bore the risk that its bill would not be paid just as it does when treating any paying patient."[66] She also held that reimbursement at cost did not constitute a taking even though "private hospitals may have to charge their paying patients more to establish a reasonable profit."[67]

Equal Protection. Justice O'Connor's 1981 lecture emphasized the frequency with which "the federal guaranty of equal protection of the laws has resulted in court review" of state and local laws.[68] Her lower court votes provide some insight into her likely approach to equal protection issues.

As already noted in the discussion of *J.C. Penney Co.*, Justice O'Connor rejected the taxpayer's equal protection claim because of the abstract rationality of the tax structure, without examining the actual impact on taxpayers.[69] A somewhat similar approach was adopted by the court in *Pastore v. Arizona Department of Economic Security,*[70] where Justice O'Connor joined an opinion holding that equal protection was not violated by provisions of Arizona's unemployment compensation scheme. The challenged provisions, in effect, provided that unemployment entitlements did not accrue during work performed for an employer from whom one was already drawing a pension. The provisions were applied to deny unemployment compensation to a civilian employee of the Department of Defense who had been drawing a military pension, on the ground that all United States entities are a single employer. The court assumed that Arizona would provide benefits "to federal employees who were recipients of

65. *Id.* at 535.
66. *Id.* at 537.
67. *Id.* at 536.
68. O'Connor, *supra* note 12, at 806.
69. *See supra* notes 38-44 and accompanying text.
70. 128 Ariz. 337, 625 P.2d 926 (Ct. App. Div. 1, 1981).

social security or railroad retirement pensions"[71] but held that the discrimination was permissible because "most wages for previous work, on which social security and railroad retirement pay are based, accrued from employment by private industry, not from employment by the United States Government."[72]

Justice O'Connor showed more willingness to examine economic impacts in her other significant equal protection opinion. In *Blair v. Stump*,[73] she held for a unanimous court that ARIZ. REV. STAT. ANN. § 12-1179 violated the equal protection clause in providing that a tenant who had lost a forcible detainer action in justice court was required to post a bond "equal to double the yearly value or rental of the premises in dispute" upon appealing to the superior court. The bond was to guarantee payment of "all costs and damages which may be adjudged against [the appellant]." By contrast, a tenant appealing from a similar action in the superior court was simply required to post a bond covering rental value of the premises pending appeal. Justice O'Connor held that the double bond requirement was invalid under *Lindsey v. Normet*[74] because it was "unrelated to the actual rent accruing or to the specific damage sustained by the landlord when the judgment is appealed" and because "it prevents nonfrivolous appeals by those who are unable to post the bond, while allowing other meritless appeals by those who can afford the bond."[75]

III. CONCLUSION

There is every reason to expect that Justice O'Connor will fully appreciate the interests of state and local governments advanced before the Supreme Court. However, her voting record on the state bench suggests that appreciation will not necessarily translate into votes, and her early votes on the Supreme Court give reason to believe that she may join the ranks of the Court's swing votes. Thus, the conscientious advocate must be prepared to persuade her on the merits of each specific case. Helpful clues to her proclivities may be available in her lower court voting, although finding clues will be more difficult than it would have been had she been elevated from a lower federal court.

71. *Id.* at 341, 625 P.2d at 930.
72. *Id.* at 342, 625 P.2d at 931.
73. 127 Ariz. 7, 617 P.2d 791 (Ct. App. Div. 1, 1980).
74. 405 U.S. 56 (1972).
75. 127 Ariz. at 10, 617 P.2d at 794.